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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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**No. 77-489**

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CITY OF WILLCOX AND  
ARIZONA ELECTRIC POWER COOPERATIVE, INC.  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION

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REPLY OF PETITIONERS TO BRIEFS  
IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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The Federal Energy Regulatory Commission (Commission) and El Paso Natural Gas Company (El Paso) oppose the grant of the petition for writ of certiorari filed herein. City of Willcox and Arizona Electric Power Cooperative, Inc. (AEP CO) hereby reply to the new arguments in these briefs.

## I. THE AGENCY AND COURT DECISIONS HERE APPLY TO ALL PIPELINES.

### A. Boiler Fuel

The Commission's claim that "[t]he evidence relating to boiler fuel" is peculiar to the El Paso system (Br., p. 11) is unexplained and unsupported. The Court of Appeals specifically complained that, despite its earlier admonition, there was still a lack of "information, particular to the usages on the El Paso system, that would sustain the logic of a 'boiler-fuel vs. all-other use' distinction" (Pet. App., A-22, fn. 8).

The Commission has never based its subordination of boiler fuel on individual findings and conclusions pertaining to a particular pipeline. Instead, it has based this policy on a uniform rationale equally applicable to all pipelines. The rationale advanced in these challenged orders evolved from a series of Commission orders and court cases involving El Paso and several other pipeline systems. As originally formulated, the Commission gave *four* reasons for classifying boiler fuel in a lower priority than other industrial uses equally able to substitute fuel oil or coal.<sup>1</sup> The first was that boilers were inefficient. It has now withdrawn this reason. The second was the greater "substitutability" of alternate fuels in boilers than in other industrial appliances. The Court of Appeals rejected this reason here. (Pet. App. A-21-A-22, fn. 8). The third reason was that it was *more practical*<sup>2</sup> to control the pollution emanating from boilers than from other industrial processes. The decision below recognized only an *economy of scale* in the cost of equipment used for this purpose, implicitly rejecting the Commission's contention that more efficient control of noxious emissions

<sup>1</sup>*State of Louisiana v. FPC*, 503 F.2d 844, 857-858 (5th Cir. 1974).

<sup>2</sup>*State of Louisiana, supra* at 857.

would also result. The fourth reason was that curtailment of boiler fuel users ahead of other industrial gas users would minimize plant shut downs and the resulting economic losses and hardships. The decision of the Court below reduced this argument to the simple claim that it is better to curtail a few larger users than many small users.

As modified by the Court below, this rationale is used today by the Commission to support its general policy of subordinating boiler fuel throughout the pipeline industry. (18 CFR 2.78(a)(1), (2) and (3)). The disposition of our petition for review will control the curtailment priority to be given boiler fuel in every currently pending and future curtailment case. Clearly, the issues we raise are important to the administration of the Natural Gas Act (Act) and are not limited to the El Paso system.

### B. Abrogation of Contract Rights

El Paso argues that the decision of the Court of Appeals abrogating the superior contractual rights of firm boiler-fuel customers over higher priority interruptible customers represents merely "a modification of the Commission's boiler fuel policy specifically designed to accomodate the unique circumstances created by state regulatory limitations affecting El Paso's California customers" (Br., p. 18). Therefore, they claim that this decision applies only to this one pipeline.

But, the decision of the Court below on the firm-interruptible contract rights issue has an industry-wide impact. *It exempts the Commission's curtailment actions from the statutory limits on its powers to override contracts between parties to regulated wholesale transactions or to override filed tariffs. A pipeline cannot change its contractual rates by merely filing revised tariffs with the Commission if its customers have*



not consented to that method of changing their contracts. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 343; *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 350 U.S. 103, 112-113. Likewise, the Commission cannot change a pipeline's filed tariff unless it finds, on the basis of record evidence, that the existing rate, classification, rule, practice or contract is "unjust, unreasonable, unduly discriminatory, or preferential" and, therefore, unlawful under Sections 4(b) or 5(a) of the Act. *Mobile, supra*, 341-343; *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.* 226 F.2d 60, 66-68 (6th Cir. 1955), *cert. denied*, 350 U.S. 987.

Neither the Commission (Br., p. 10) nor El Paso (Br., p. 16) claim that the Court's action in sustaining the abrogation of contract rights was based on a finding of the type required by the statute. Instead, they defend that action on the basis of *FPC v. Louisiana Power and Light Co.*, 406 U.S. 621, 646 and *American Smelting and Refining Co. v. FPC*, 494 F.2d 925, 935-36, *cert. denied* 419 U.S. 882. However, those cases follow the legal standard we advocate. In *Louisiana Power, supra* at 642-646, the agency's statutory power to regulate curtailment of direct sales was upheld because its action met the substantive standard of Section 4(b). In *American Smelting, supra* at 933-934, the issue was whether, as interpreted by the agency, El Paso's tariffs were discriminatory. Under that interpretation, El Paso's California customers were exempt from curtailment at the expense of all east-of-California customers. The Court affirmed the agency's holding that such tariff provisions were unlawfully discriminatory and held that, to the extent of such illegality, the tariffs could be overridden.

### C. End-Use Data

The Commission argues that the challenged orders here merely apply the policies set forth in Order No. 467-B, 49 FPC 583, to one particular pipeline, El Paso (Br. p. 11). Those policies, however, establish only the priorities of service to different end-uses during periods of curtailment. They do not purport to deal with the manner in which data should be collected and verified in order to classify particular gas requirements in the appropriate end-use priority. The rationale given here by the Commission and affirmed by the Court "...that distributors' 'nominations' will be presumptively accurate" (Pet. App. A-53) is, on its face, broad enough to encompass every interstate pipeline system. This answers the Commission's unexplained and unsupported claim that the situation is unique. (Br., p. 11).

El Paso argues that the decision of the Court below has only a limited application since the agency has not made a formal and codified rule (Br., pp. 17-18). However, an agency can change its policies and legal requirements either on a case-by-case basis or by rulemaking. Here, the Commission has established a new general policy and rule of law. Thus, the mere presumption that customer "nominations" are correct can now be substituted for evidence of actual end-use of gas.

### II. THE ABSENCE OF FRAUD DOES NOT SUBSTITUTE FOR ACTUAL END USE DATA

The Commission argues that it properly relied on the presumption that there was no fraud in customer nominations (Br., p.10) and correctly perceives that this was the heart of the decision below. But, the absence of fraud or negligence does not protect against honest mistakes which unlawfully deprive us of gas. The Court below noted that one customer had *by error*

overstated a particular end use requirement by a factor of 23 times (Pet. App., A-54-A-55, fn. 20). The Court conceded that this was not a isolated case, stating "...AEPCO has merely located one example, among many that are inevitable, of a misunderstanding between data requested and data furnished." (Id.) Such errors are only inevitable when "nominations" are substituted for end use data reflecting actual gas usage by priority. Such actual data is not equally subject to "misunderstanding."

The possibility of honest mistake has been greatly magnified by El Paso's failure to insure that its customers' nominations data were determined in a uniform manner and complied with the criteria for classification in a specific high priority.<sup>3</sup> El Paso does not know what, if any, information its distributor customers collected concerning their customers<sup>4</sup>. It has no knowledge of the criteria used by its California distributor customers to classify requirements by priority, but assumed that this task was performed in accordance with its tariff.<sup>5</sup>

Nor is there any merit to the arguments of the Commission (Br., p. 10) or El Paso (Br., pp. 9, 10-11) that we have not shown errors or unfairness in El Paso's administration of its plan. El Paso has neither collected nor filed with the Commission any data showing actual nominations or gas usage on a consumer-by-consumer basis. Without such data, it is impossible to

<sup>3</sup>*El Paso Natural Gas Company*, Docket CP74-289 et al., Tr. 1108. Cited portions of this transcript were lodged with the Court below by Order dated February 20, 1976.

<sup>4</sup>*El Paso*, *supra* at Tr. 341.

<sup>5</sup>*El Paso*, *supra* at Tr. 443.

determine whether any consumer has fraudulently or honestly misclassified its requirements in a higher priority than they deserve. El Paso's customers have never been required to separately state their nominations by sub-priority of each priority. As a result, no one knows how much of the gas nominated in Priority 2 is attributable to irrigation gas, ignition and flame stabilization gas, storage injection gas, process gas, feedstock gas or plant protection gas! These patent deficiencies of the nomination system mean that El Paso itself does not know whether a fraud is being committed. How then can these intervenors offer specific proof of such fraud?

### III. THE COURT OF APPEALS FOUND THAT THE ALLEGED PUBLIC BENEFITS OF THE ANTI-BOILER FUEL POLICY DID NOT EXIST

#### A. The Claimed Pollution Control Economies Do Not Exist.

The Commission alleges that boiler-fuel users can more economically control pollution *after* they convert to substitute fuels and that this minimizes pollution (Br. p. 9). The Court of Appeals held only that the larger size of boiler installations was "a reason for the more economical control of air pollution" (Pet. App., A-22-A-23). This holding was based entirely on testimony by witnesses who were speaking only of the *relative cost* of controlling pollution as a reason for imposing the burden of *initial conversion* upon the large boiler-fuel users, e.g., R. 7059-7060 (Goldfield); R. 7054-55 (Markus).

#### B. Curtailment of Boilers for the Benefit of Other Industrial Users Will Not Reduce Pollution.

The Commission also argues (Br., p. 6) that the Court below

upheld its conclusion that "increased air pollution resulting from the use of alternate fuels could be more efficiently controlled, per unit of fuel, by boiler fuel users because of the large size of their installations" (Br., p. 7). If true, this would benefit the public through reduction of pollutant emissions. However, the Court of Appeals made no such holding. It referred only to "the more economical control of air pollution" by boilers and to testimony that "a 'large pollution control installation can control pollution at a lower cost per unit of fuel consumed than can a small installation'" (Pet. App., A-22-A-23). Thus, the Court implicitly rejected the Commission's finding that air pollution "could be more efficiently" controlled by boiler-fuel users (Pet. App. A-91).

Even if the Court had accepted this finding, efficiency in pollution control is only one factor in determining whether the public interest in a cleaner environment is served by the anti-boiler fuel policy. If minimization of pollution harmful to health is the test of such public benefit, the Commission would have to consider many other factual issues.<sup>6</sup> The Commission has not attempted to make any findings concerning any of these environmental factors and had no evidence on these issues before it when it issued Opinions 697 and 697-A.

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<sup>6</sup>Among other factual issues, these are: that pollution abatement equipment does not remove harmful sulfur oxide and nitrogen oxide emissions; tall stacks merely disperse noxious emissions over larger areas; non-boiler fuel users can reduce pollutants as efficiently as boiler fuel users, even if at greater cost; high temperature boilers emit more oxides than other industrial appliances; and electric utilities are usually cited in cities, exposing more people to harmful pollution than industrial plants.

### C. Curtailment of Boiler Fuel for the Benefit of Other Industrial Gas Users Does Not Minimize Economic Disruption

The Commission's "economic disruption and dislocation" argument has been reduced to the simple proposition that curtailing large boiler fuel installations first subjects fewer industrial plants to curtailment (Br., pp. 7, 9-10; Pet. App. A-91). However, there has been no hearing and there is no evidence to support the agency's *presumption* that curtailing fewer industrial users will prevent plant shutdowns. In fact, the economic impact of curtailment on a gas user does not depend on the volume of gas he requires, but on other factors such as the ratio between fuel costs and total costs and the user's ability to pass on the higher cost of substitute fuels. For example, fuel costs are a major part of an electric utility's operating costs but a small part of the operating costs of most other industrial plants. Again, several small non-boiler industrial users may be fully able to pass on the additional cost of substitute fuels, while one large boiler fuel user may be compelled to close its plant during curtailment because it cannot pass on these costs. Yet that single boiler fuel user is being curtailed for the benefit of those other industrial users.

In any event, the Court's objective of curtailing fewer industrial users can justify *only* subordinating *all* large industrial gas users to *all* small industrial gas users. Therefore, relative size and *only* size should be the criteria for classification in higher or lower priority. *Instead, all boiler fuel users have been subordinated to all non-boiler users—irrespective of size.*

As a result, smaller boiler fuel users are frequently curtailed for the benefit of much larger non-boiler fuel users. El Paso calls this clear injustice a "hypothetical or hypertechnical" objection (Br., p. 15). However, as shown in Appendix A, two direct



industrial customers of El Paso take *substantially more gas* than AEPCO in both the summer and winter. If curtailment priorities were set on the basis of relative size, these industrial customers would have at least shared the burden of curtailment with AEPCO. Such size-based priorities, as defined in Priorities 4 and 5 of El Paso's own curtailment plan,<sup>7</sup> would subject 88% of El Paso's direct industrial Priority 3 non-boiler fuel requirements to equal curtailment with Priority 5 boiler fuel requirements in the summer, and 92% to such equal curtailment in the winter. These facts also show that there is no evidentiary basis for the presumption that boiler fuel plant locations are larger than other industrial installations.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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<sup>7</sup>These are the only size based priorities for industrial customers and apply only to boiler fuel customers. (Pet. App. A-10)

## APPENDIX A



## APPENDIX A

### COMPARISON, BOILER FUEL AND NON-BOILER FUEL INDUSTRIAL REQUIREMENTS\* (in Mcf)

	Summer Requirements			
	Priority 3	Priority 4	Priority 5	Total
American Smelting & Refining, El Paso, Texas	809,204	—	—	809,204
American Smelting & Refining, Hayden, Arizona	1,121,707	—	—	1,121,707
Arizona Public Service-Salt River Project	—	25,550	13,388,587	13,414,137
Compania Minera de Cananea	929,200	—	1,070,969	2,000,169
Del Norte Natural Gas Company	79,100	—	264,202	343,302
El Paso Electric Company	—	—	5,421,057	5,421,057
Inspiration Consolidated Copper Company	1,134,182	—	—	1,134,182
Kennecott Copper Company (Arizona)	1,356,664	—	322,951	1,679,615
Kennecott Copper Company (New Mexico)	404,800	—	1,162,199	1,566,999
Lordsburg, City of	—	—	1,189,710	1,189,710
Magma Copper Company	3,084,055	—	—	3,084,055
Phelps Dodge Corporation	7,689,403	—	778,923	8,468,326
Willcox, City of	—	—	2,926,943	2,926,943

#### Winter Requirements

American Smelting & Refining, El Paso, Texas	987,346	—	—	987,346
American Smelting & Refining, Hayden, Arizona	1,365,729	—	—	1,365,729
APS Salt River Project	1,642,857	—	6,994,839	8,637,696
Compania Minera de Cananea	914,050	—	1,099,929	2,013,979
Del Norte Natural Gas Company	28,329	—	66,713	95,042
El Paso Electric Company	—	—	3,162,327	3,162,327
Inspiration Consolidated Copper	1,236,696	—	—	1,236,696
Kennecott Copper Co. (Arizona)	1,403,608	—	442,245	1,845,853
Kennecott Copper Co. (New Mexico)	398,200	—	1,279,188	1,677,388
Lordsburg, City of	—	—	1,132,475	1,132,475
Magma Copper Company	3,215,229	—	—	3,215,229
Phelps Dodge Corporation	9,088,980	—	—	9,088,980
Willcox, City of	879,850	—	1,769,192	2,649,042

\*All large Priority 3 direct industrial customers are included. All Priority 5 direct industrial customers, regardless of size, are included. No individual data is available for any customer of El Paso's California or east-of-California distributor customers.

Source: Summer: *El Paso Natural Gas Company*; Compliance Filing Pursuant to Opinion 697-A, Docket RP72-6, dated March 31, 1977.  
Winter: *El Paso Natural Gas Company*; Estimate of Winter Season Gas Availability by Priority of Service, Docket RP72-6, dated September 30, 1977.